Supreme Court, U.S.
FILED
AUG 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

VS.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. FSLIC HAS CONCEDED THAT IT LACKS THE STATUTORY AUTHORITY TO ADJUDICATE CREDITOR CLAIMS.

Respondent Federal Savings and Loan Insurance Corporation ("FSLIC"), now represented before this Court by the Solicitor General, has conceded that it does not have the power to adjudicate creditor claims followed by limited judicial review under the Administrative Procedure Act,[1] contrary to its prior position and the holding of the court of appeals in this case.[2] FSLIC has further conceded that the dismissal of this case for lack of subject matter jurisdiction

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[1] 5 U.S.C. (& Supp. IV) §§ 701 *et seq.* (the "APA")

[2] *See* Brief for the Respondent at 20, n.13 (hereinafter "B.R. ...."). ("The Bank Board . . . has asserted that the process of allowing or disallowing

was error,[3] and that this Court should "vacate the court of appeals' decision . . .." B.R. 39. Petitioner Coit Independence Joint Venture ("Coit") accepts these concessions,[4] and believes that they represent a long overdue recognition that the position taken by FSLIC below was not a defensible one, and would have wreaked havoc with the constitutional rights of claimants and ousted the federal courts of the power to hear a broad range of claims over which Congress has given them exclusive original jurisdiction.[5]

However, FSLIC attempts to preserve the remnants of the decision below by recasting the holding of the court of appeals as one requiring claimants to exhaust their administrative remedies before suing in court.[6] Although an exhaus-

claims is an administrative 'adjudication' subject to judicial review under the [APA]. The Solicitor General does not endorse that position . . ..").

[3] *See* B.R. 16 ("We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction."); B.R. 39 ("In the Solicitor General's view, it is not accurate to say that Section 5(d)(6)(C) limits the subject-matter jurisdiction conferred by 12 U.S.C. 1730(k)(1).").

[4] FSLIC never expressly states that *de novo* review would be available following exhaustion of administrative remedies. However, if FSLIC does not contemplate *de novo* review in court, its concession would be a change in name only and all of Coit's constitutional and statutory arguments raised in its main brief would be unaffected by FSLIC's concession. Nonetheless, because FSLIC repeatedly acknowledges the right of claimants to "sue in court" or to seek "judicial enforcement" or "judicial resolution" of claims following administrative action (B.R. 15, 16, 20, n.13), Coit will assume that FSLIC's new position contemplates *de novo* review in court following completion of the administrative process.

[5] *See* Brief for Petitioner at 40, and n.33. *See also* Brief of Amicus Curiae U.S. League of Savings Institutions at 4-9, and Brief of Amicus Curiae Watson *et al.*, at 5-8.

[6] *See* B.R. 19-20 ("Whatever the scope of the *Hudspeth* decision, we seek to defend the decision in the present case *only* on the ground that the Bank

tion requirement does not appear to have been explicitly raised in the courts below,[7] Coit submits that there is no more of a statutory basis for imposing an exhaustion requirement on claimants than there was for granting FSLIC the power to adjudicate such claims.

FSLIC suggests that Coit has impliedly recognized the legitimacy of an exhaustion requirement.[8] This is incorrect. Coit does not challenge the Federal Home Loan Bank Board's (the "Board's") authority to establish a *voluntary* claims procedure. However, Petitioner does dispute FSLIC's assertion that the filing of such claims is a prerequisite to suit and that judicial remedies must be held in abeyance pending the administrative processing of any such claim. A recognition of the Board's authority to establish a voluntary claims procedure is not tantamount to the acceptance of a mandatory exhaustion requirement.[9] The receiver's authority to

Board and FSLIC plainly do have power to require claimants first to present their claims to FSLIC, and exhaust the administrative process . . ..") (emphasis added); and *id.* at n.13 ("The Solicitor General . . . defends the judgment below to the extent that it requires a creditor to present his claim to FSLIC and exhaust the claims review process before suing on the claim.").

[7] Joint Appendix at 27-28 (hereinafter "J.A. ....").

[8] *See* B.R. 27 ("Coit appears to concede that the Bank Board's regulations give FSLIC 'the right in the first instance to decide whether to pay or refuse to pay a claim.' ").

[9] A voluntary claims procedure exists under the National Bank Act (see 12 U.S.C. § 194), an Act that empowers the Comptroller of the Currency to appoint receivers over national banks. However, despite repeated arguments that this claims procedure was mandatory, the courts have consistently held that the presentation of claims to a national bank receiver is not a prerequisite to suit. *See e.g., Schulenberg v. Norton*, 49 F.2d 578, 580 (8th Cir. 1931); *Martin v. First Nat'l Bank of Rush City*, 51 F.2d 840, 848 (D. Minn. 1931). While it is true, as FSLIC points out, that the National Bank Act expressly permits creditors to present their claims in court (*see* B.R. 23-24, n.16), this distinction is not controlling. Claimants against

pay or not to pay claims may be exercised as an alternative to or concurrently with the authority of the courts to determine the validity and amount of claims. Coit has never agreed that judicial remedies must await the Board's and/or FSLIC's decision to pay or not to pay a claim, however long that may take.

II. Congress Did Not Intend To Require Creditors Of A Failed Savings And Loan To Exhaust Administrative Claims Procedures Before Resorting To The Courts.

A. Exhaustion Of Administrative Remedies May Be Required Only If It Is Consistent With Congressional Intent.

This Court has held that "the initial question whether exhaustion is required should be answered by reference to Congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 501-02 (1982) (emphasis added). Accordingly, a court should not relinquish an affirmative grant of jurisdiction absent a clear Congressional intent to require exhaustion of administrative remedies.

There is no express statutory requirement in any of the Board's or FSLIC's enabling legislation which makes any reference whatsoever to the exhaustion of administrative

failed savings and loan institutions are also authorized to sue in court under affirmative jurisdictional grants of power to bring specific federal or state causes of action, *see, e.g.*, 15 U.S.C. § 78aa (1982) (Securities Exchange Act of 1934); 18 U.S.C. § 1964 (1982) (RICO), and nothing in the Home Owners' Loan Act or the National Housing Act prohibits claimants from exercising these rights in the context of a FSLIC receivership. *See* 12 U.S.C. § 1730(k)(1). In short, the presumption is that the claims procedure merely supplements judicial remedies unless FSLIC's enabling legislation expressly curtails a claimant's access to the courts.

remedies by claimants against a failed savings and loan institution. As FSLIC itself admits, "HOLA itself does not say, in terms, that claimants must present their claims to the receiver and exhaust that process before proceeding in court." (B.R. 29). Instead, FSLIC infers a Congressional intent to require exhaustion from a series of statutes which confer broad regulatory power over savings and loan associations, but which nowhere grant the Board express authority to regulate the rights of persons having claims against such institutions. Although it is true that "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions,' "[10] the power to regulate the savings and loan institutions themselves is not the equivalent of the power to regulate the rights of third parties who have claims against those institutions. In discussing the statutory authority conferred on the Board, FSLIC has ignored this vital distinction.

B. The Statutory Provisions Relied Upon By FSLIC Do Not Demonstrate A Congressional Intent To Require Exhaustion.

1. *12 U.S.C. § 1464(d)(6)(C)*

In support of its position that Congress intended a mandatory exhaustion requirement, FSLIC relies on the language of 12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act (hereinafter "HOLA") which provides that "no court may . . . restrain or affect the exercise of powers or functions of the conservator or receiver." However, as discussed in the Brief for Petitioner (hereinafter "B. Pet. . . . ."), this provision was designed to "give FSLIC as statutory receiver the same protection from interference with its

[10] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 166 (1982).

dominion and control over receivership property as a common law receiver could have obtained from a receivership court."[11] The "restrain or affect" language was never intended to act as a bar to insulate FSLIC from *in personam* actions like the present one which do no more than seek to establish the validity and amount of a claim against a debtor in receivership. *See Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60 (2d Cir. 1934).

Contrary to the position taken by amici on the difference between statutory and equity receiverships,[12] the rule announced in the foregoing cases, i.e. that a suit to liquidate a claim does not interfere with the powers or functions of a receiver, has also been applied to "statutory receiverships" such as those over national banks. *See Bank of Bethel v. Pahquioque Bank*, 81 U.S. (14 Wall.) 383, 20 L. Ed. 840 (1871). Although the specific "restrain or affect" language is not

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[11] B. Pet. 17-18; *see also* B. Pet. 15-18.

[12] *See* Brief for the Federal Home Loan Bank of Dallas, et al., at 13- 16 and n.5; and Brief for National Council of Savings Institutions at 20.

Amici also rely in their briefs on recent amendments to the Federal Credit Union Act ("FCUA") contained in the Competitive Equality Banking Act of 1987, 12 U.S.C. §§ 1787(a)(1)(B) and 1787(j), and accompanying legislative history. *See* Brief for Amicus National Council at 14-17; Brief of Amici Federal Home Loan Banks at 16-17. This reliance is misplaced because under the FCUA, the validity of claims may be "adjudicated in a court of competent jurisdictation," 12 U.S.C. § 1766(b)(4)(B) (1980), a premise that is inconsistent with a mandatory and exclusive administrative scheme. The amendments relied on did not alter the courts' jurisdiction to determine the validity of claims, and, as commentary on similar language in HOLA and NHA, the legislative history is nothing but the post hoc comment of a subsequent Congress, *see Consumer Product Safety Commission v. GTE Sylvania*, 64 L. Ed.2d 766, 778 (1980), in connection with a totally different statute. Significantly, the Solicitor General does not rely in his brief on FCUA and amendments thereto.

contained in the National Bank Act,[13] the federal courts have long recognized that a statutory receiver appointed by the Comptroller of the Currency is not subject to judicial interference, except in extraordinary circumstances. *See Earle v. Pennsylvania*, 178 U.S. 449 (1900); *Edson Realty Co. v. Commercial Nat'l Bank*, 29 F. Supp. 22, 27 (W.D. La. 1939); *Way v. Camden State Deposit & Trust Co.*, 21 F. Supp. 700, 702-04 (D.N.J. 1937). Despite this prohibition, suits by claimants to establish the validity and amount of their claims against national banks have never been considered an interference with the receiver because:

> [T]he judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided.

Bank of Bethel, 14 Wall. at 402. *See also Earle v. Pennsylvania*, 128 U.S. at 455.

Similarly, in this case, any judgment recovered from a court must be presented to FSLIC as receiver in order to secure a ratable distribution of assets. Thus, this type of suit in no way restrains or affects the powers or functions of a receiver within the meaning of Section 1464(d)(6)(C). Because the purpose of this statutory language is to preserve the receiver's possession of the property of the insolvent debtor, and not to prevent claimants' access to the courts, FSLIC's reliance upon this language as evidence of Congressional

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[13] 12 U.S.C. §§ 1 *et seq.*

intent to require exhaustion of administrative remedies is clearly misplaced.[14]

2. *12 U.S.C. § 1464(d)(11)*

FSLIC relies on its authority to "make rules and regulations . . . for the conduct of receiverships" in 12 U.S.C. § 1464(d)(11) as a basis for adopting the regulations in question. However, the Board's regulations, to the extent that they are construed to prohibit access to the courts before completion of the claims procedure, is not a proper or authorized exercise of administrative power. *Cf. Bowen v.*

[14] FSLIC claims that *Riehle v. Margolies* and *Morris v. Jones* are inapplicable because "[t]he issue in this case . . . is not possession, . . . [but] whether a claimant's suit to establish the amount of the claim would 'restrain or affect' FSLIC's express authority under the NHA and the Bank Board's regulations to determine whether to pay the claim without litigation." *See* B.R. 29-30, n.20. There are two answers to this contention.

First, Coit's reliance upon *Riehle v. Margolies* and *Morris v. Jones* is highly pertinent because historically the purpose behind insulating receivers from judicial interference was to protect their possession of receivership assets, not to prevent claimants from obtaining a judicial resolution of the validity and amount of their claims. The fact that the prohibition against interference with the receiver's functions coexisted with the judicial resolution of claims both at common law and under the National Bank Act demonstrates that Section 1464(d)(6)(C) was not designed to deny claimants access to the courts.

Secondly, the fallacy of FSLIC's suggestion that Section 1464(d)(6)(C) somehow bars judicial interference with any claims process the Board may choose to adopt is demonstrated by the fact that the "restrain or affect" language was first added to HOLA by the Financial Institutions Supervisory Act of 1966. Coit submits that statutory language which first appeared in 1966 could not have been intended to protect a claims procedure adopted as far back as 1941, and clearly was not designed to protect a claims procedure revised (and for the first time made explicitly mandatory) in 1988. *See* 53 Fed. Reg. 13105, 13106.

Finally, FSLIC's characterization of the issue improperly assumes that FSLIC has the authority to determine claims without litigation. Such an approach assumes the very issue in dispute.

American Hosp. Ass'n, 476 U.S. 610, 106 S.Ct. 2101, 2121-23 (1986). The power in Section 1464(d)(11) to "make rules and regulations . . . for the conduct of conservatorships or receiverships" does not encompass the power to limit the access of claimants to the courts. Congress has granted the Board the power to define the functions of the receiver; it has not granted the Board the power to limit the rights of potential litigants with claims against the receivership estate. The Board can no more decree an exhaustion requirement by regulation without a proper statutory basis than it could declare its own decisions immune from judicial review. Whether exhaustion is required is a question of Congressional intent, not administrative fiat. *See Patsy*, 457 U.S. at 501-02.[15]

[15] FSLIC argues that the Board's requirement of a mandatory claims process is a valid exercise of its rule-making power under Section 1464(d)(11), the validity of which must be tested under the well-established standard that a regulation promulgated under the broad grant of rule-making power "will be sustained so long as it is reasonably related to the purposes of the enabling legislation." B.R. 26-28, citing *Mourning v. Family Publications, Inc.*, 411 U.S. 356, 369 (1973). Petitioner disagrees with this analysis.

First, the "Interim Procedures" adopted unilaterally by the Bank Board and published April 21, 1988, are expressly not adopted pursuant to 1464(d)(11) but purportedly pursuant to 1437. 53 Fed. Reg. 13105 (Apr. 21, 1988). They were not adopted, as 1437 requires, in accordance with the notice and comment procedures of 5 U.S.C. 553 (1982), but simply published and made effective retroactively to July 1, 1986. *See* T. Pfeiler, *FSLIC Adjudication of Claims*, 53 Legal Bulletin 433, 461, n.102.

Secondly, the rule-making authority in this case is much narrower than that involved in the *Mourning* case. *Mourning* involved a statute which empowered the agency to "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act." 411 U.S. at 369. The grant of power in the instant case is far more limited. Where there is a narrower grant of power, the scope of an agency's rules and regulations may not exceed the power granted the agency by the enabling legislation. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). *Cf. Zuber v. Allen*, 396 U.S. 168, 183 (1969). Coit submits that FSLIC's power to

3. *12 U.S.C. § 1729(d)*

FSLIC also relies on 12 U.S.C. § 1729(d) of the National Housing Act (hereinafter the "NHA") which provides that FSLIC "shall have the power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise and release claims in favor of or against the insured institutions, and to do all other things that may be

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regulate the conduct of receiverships does not include the power to limit a claimant's assess to the courts.

More importantly, the validity of regulations which purport to limit access to the courts is not tested by a reasonable relationship test, but by the consistency of such regulations with legislative intent. *See Levers v. Anderson*, 326 U.S. 219, 222 n.4 (1945) ("Of course, the mere fact that the regulations might bar judicial review is not conclusive, for the court will consider whether these are consistent with the legislative intent."). *Cf. I.N.S. v. Cardoza-Fonseca*, 94 L. Ed.2d 434, 107 S. Ct. 1207 (1987). Under *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 501-02 (1982), there is a presumption against deferring the exercise of jurisdiction under a federal statute unless it is shown to be consistent with Congressional intent. FSLIC should not be allowed to avoid the burden of showing a Congressional intent to restrict the access of claimants to the courts simply by enacting a regulation requiring a mandatory claims procedure. The issue remains one of Congressional intent, not reasonable relationship, whether an agency regulation requiring exhaustion exists or not.

FSLIC also relies upon *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) where this Court stated that "[t]he statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration." B.R. 28. However, *Weinberger* is completely inapposite because that case involved construction of the Social Security Act which expressly defers judicial review until "after any final decision of the Secretary [of HEW] made after a hearing." *See* 42 U.S.C. § 405(g). The Act also expressly empowers the Secretary to "flesh out" the exhaustion requirement by regulations. 422 U.S. at 766 and n.9. *See also* 42 U.S.C. § 405(a). The quoted statement was thus made in the context of statutory authority which imposed an express exhaustion requirement and which expressly directed the Secretary to implement exhaustion by regulations. Neither authority is granted by the statutes involved in this case.

necessary in connection therewith, subject only to the regulations of the Federal Home Loan Bank Board." Nothing in this language supports a mandatory exhaustion requirement. The power to carry on the business of and to collect obligations of insured institutions simply authorizes FSLIC to manage failed savings and loans and to initiate collection efforts on their behalf, including judicial proceedings in the courts. Similarly, the power to settle, compromise and release claims merely authorizes FSLIC to enter into settlement agreements on behalf of failed savings and loans. Likewise, the power to do all other things in connection "therewith," i.e., in connection with the previously enumerated powers, merely implements such powers, and is therefore no authorization to establish a mandatory claims procedure which would restrict the access of claimants to the courts.

4. *12 U.S.C. § 1729(b)(1)(B)*

FSLIC next argues that the language in 12 U.S.C. § 1729(b)(1)(B) which instructs FSLIC to "pay all valid credit obligations of the association" would be "superfluous if the receiver were expected to await a court's instruction to pay each claim" (B.R. 24). In making this argument, FSLIC once again ignores the well-recognized distinction between the liquidation of a claim, *i.e.*, the establishment of its validity and amount, and the distribution of receivership assets. See *Morris v. Jones*, 329 U.S. at 548-49. The statutory directive to "pay all valid credit obligations of the association" speaks only to FSLIC's role in the distribution process; it does not make FSLIC the exclusive forum for the determination of the validity of claims. There is nothing inconsistent between the directive to FSLIC to pay "valid" credit obligations and a role for the judiciary in determining which claims are valid. This duality was not only recognized at common law; it is made explicit in the National Bank Act, 12 U.S.C. § 194, where the

Comptroller is directed to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." (Emphasis added.)

The receiver's duty to pay valid credit obligations is not rendered "superfluous" by the concurrent judicial power to determine the validity of claims. The receiver can always decide to "pay" a claim, thereby rendering moot any outstanding judicial proceeding to determine the validity of a claim. But even if the receiver decides to await the outcome of the judicial proceeding, his duty "to pay" is not rendered superfluous by the court's decision because only the receiver can determine the pro-rata share of the assets payable to those claimants whose claims have been found to be valid either by the courts or the receiver. Accordingly, while only the receiver can make a distribution of assets, nothing in the directive to "pay all valid credit obligations of the association" precludes claimants from resorting to the courts for a determination of the validity of their claims. FSLIC can establish a claims process, but there is no statutory authority for FSLIC to make that process exclusive and mandatory.

5. *12 U.S.C. § 1729(b)(1)(A)(v)*

Finally, FSLIC contends that a mandatory exhaustion requirement is necessary for it to liquidate a failed association "in an orderly manner" as required by 12 U.S.C. § 1729(b)(1)(A)(v). This "necessity" argument is premised on the assumption that a centralized process for all creditor claims is necessary to inform FSLIC of all claims against the receivership estate so that FSLIC can give like treatment to similarly situated claims. B.R. 25-26.

Coit submits that FSLIC has failed to demonstrate why these laudable goals are not equally attainable by a system

which permits a claimant the option of filing a claim with FSLIC and/or filing a complaint in court. The filing of a complaint in court informs FSLIC of the nature and amount of a claim no less than the filing of a proof of claim in the administrative process. Because FSLIC must be served with a copy of each such complaint, the fact that lawsuits may be pending in different locations throughout the country would not prevent FSLIC from establishing a central location where both administrative claims and judicial complaints could be analyzed.[16] If any necessary information is lacking, FSLIC can simply instruct its attorneys to obtain it in the lawsuit or by agreement with opposing counsel.

However, the most compelling argument against FSLIC's assertion that it must have a mandatory claims process in order to perform an orderly liquidation is the fact that the FDIC has liquidated financial institutions for over fifty years without a mandatory claims procedure.[17] The fact that claimants under the National Bank Act have been given the option of filing claims or going to court,[18] and the fact that national bank receivers cannot impose mandatory bar dates which prevent access to the courts,[19] has not prevented the FDIC from accomplishing the orderly liquidation of banks.[20] Furthermore, as far as Coit can ascertain from the published decisions, FSLIC has not had a mandatory claims process

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[16] Furthermore, under Fed. R. Civ. P. 12, FSLIC has 60 days (two months) in which to analyze the claims before its answer is even due and therefore before any attorneys' fees need be expended.

[17] *See* n.9, *supra*.

[18] *See* 12 U.S.C. § 194; *Martin v. First Nat'l Bank of Rush City*, 51 F.2d 840, 848 (D. Minn. 1931).

[19] *See Queenan v. Mays*, 90 F.2d 525, 530-31 (10th Cir. 1937).

[20] *See generally* Note, Creditors Remedies Against the FDIC as Receiver of a Failed National Bank, 64 Tex. L. Rev. 1429 (1986).

until recently and has sought judicial enforcement of an exhaustion requirement only once in the last forty-five years.[21] Finally, trustees in bankruptcy have managed to discharge their duties of liquidating large corporations without a procedure that prevents creditors of the bankrupt from having the validity of their claims determined in court.[22]

For these reasons, FSLIC cannot make a convincing case that its mandate to liquidate a failed association "in an orderly manner" constitutes a statutory authorization to create a mandatory claims procedure. At best, these assertions of necessity are merely policy arguments which should be presented to Congress. They are not indications of Congressional intent. As this Court stated in *Patsy*: "[P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with Congressional intent." 457 U.S. at 513.

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[21] FSLIC asserts that "[t]he Bank Board has consistently imposed this exhaustion requirement since its original promulgation of its receivership regulations in 1941." B.R. 28, n.19. The accuracy of this assertion is belied by the fact that FSLIC can cite only to a single case, *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705, 706 (8th Cir. 1942), in which exhaustion was raised. Even in *Fields*, the plaintiff's failure to exhaust administrative remedies was raised only as an alternative defense by FSLIC and was not even reached by the court. Furthermore, the Board proposed to change its regulations to expressly exclude review by the courts prior to agency action for the first time in 1985, after the *Hudspeth* decision. *See* 50 Fed. Reg. 48970, 48977 (1985); *see also* 53 Fed. Reg. at 13106 and 13111 (1988).

[22] Indeed, after *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), many creditor claims in bankruptcy must be determined in court. While Section 362 of the United States Bankruptcy Code imposes an automatic stay upon judicial proceedings at the time of the debtor's filing for bankruptcy, such stay in most cases is lifted thirty days after request by an interested party.

III. COUNTERVAILING POLICY CONSIDERATIONS WEIGH STRONGLY AGAINST FSLIC'S PROPOSED EXHAUSTION REQUIREMENT.

The statutory and policy arguments raised by FSLIC in favor of imposing an exhaustion requirement not only fail to withstand close scrutiny, they ignore important countervailing considerations which argue strongly against such a requirement.

A. A Mandatory Claims Process Would Deny Claimants Due Process Of Law Because FSLIC And The Board Are Not Disinterested Tribunals.

Because FSLIC concedes that HOLA and the NHA do not grant FSLIC the power of adjudication, and "[i]f contested, the claimant can take his claim to court for judicial resolution" (B.R. 40), it argues that Coit's constitutional objections, even if ripe,[23] "would have no bearing upon the proper resolution of this dispute." *Id.* Coit emphatically disagrees with this position. While FSLIC's concessions may have muted the force of the constitutional claims under the Seventh Amendment[24] and Article III, Coit's due process chal-

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[23] The court of appeals in this case completely overlooked this Court's discussion of ripeness in *Thomas v. Union Carbide Agricultural Products, Inc.*, 473 U.S. 568, 105 S Ct. 3325, 3332-34 (1985). Coit's constitutional claims are clearly ripe for adjudication under this Court's analysis in *Thomas*. *See also Gibson v. Berryhill*, 411 U.S. 564 (1973).

[24] Amicus argues that Coit's claims against FirstSouth are now claims against the receivership estate, and by analogy to bankruptcy proceedings have been converted into equitable claims to a pro rata share of the *res* as to which the right to jury trial is inapplicable, citing *Katchen v. Landy*, 382 U.S. 323 (1966). Brief of National Council at 27. Coit submits that this is incorrect. After *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Coit has the right to have the validity of its claims (as opposed to questions of ratable distribution) determined by an Article III court in a proceeding at law. Because of *Marathon*, the bankruptcy analogy in *Katchen* is no longer controlling. Instead, it is the

lenge and the fundamental unfairness of allowing an interested federal agency to develop and apply an exhaustion requirement remain fully intact.[25]

As Coit argued in its opening brief, FSLIC has both a pecuniary interest and an adversarial interest in the allowance or disallowance of claims filed by Coit and other creditors (B. Pet. 44-47). These adverse interests have a significant impact upon FSLIC's proposed exhaustion requirement in a number of important respects.

First, FSLIC's interest in the outcome of Coit's claims is a sufficient basis in and of itself to excuse exhaustion. *See Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (exhaustion is not required where the governmental agency has a pecuniary interest in the outcome of the claim because such interest makes the administrative remedy inadequate). In such circumstances, "the question of the adequacy of the administrative remedy [becomes] . . . for all practical purposes identical with the merits of [Plaintiff's] lawsuit." 411 U.S. at 575.

Secondly, Congress has assigned to FSLIC the duty to "collect all obligations of the insured institutions."[26] Because

character of Coit's claims which is dispositive. "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

[25] Coit is hesitant to forego its Seventh Amendment and Article III claims even on the assumption that it will receive *de novo* review in the courts because it is deeply concerned that FSLIC may be trying to accomplish indirectly through "exhaustion" what it cannot do directly through "adjudication." *See* B.R. 21 ("FSLIC would generally expect to contend that the plaintiff is limited [in a subsequent judicial proceeding] to the claim he presented to FSLIC and the Board and must rely on the legal theory and evidence he offered in its support.") Indeed, FSLIC is still claiming adjudicatory power in lower courts, even after the concessions made in this case.

[26] 12 U.S.C. § 1729(d).

of this role, FSLIC will frequently have claims against the very creditors who will be required to submit to FSLIC's mandatory claims procedure. Given FSLIC's role as litigant, together with its pecuniary interest in the outcome of creditor claims, claimants cannot reasonably be expected to have any confidence in the fairness and impartiality of FSLIC's procedures. This Court should hesitate to attribute to Congress an intention to permit FSLIC and the Board to develop and apply a mandatory exhaustion requirement in circumstances where the agency's own impartiality is suspect. *Cf. Tocci v. Yankee Bank for Fin. and Sav., FSB*, CCH Fed. Banking L. Rep. ¶ 87,389 (D.C. Mass. May 25, 1988) ("An interpretation of a statute that attributes to Congress a manifestation of intent to create powers in an agency so likely to lead to impairment of impartiality in adjudication is inherently suspect.").

This concern with FSLIC's lack of impartiality is not merely academic. If the exhaustion requirement proposed by FSLIC is approved, FSLIC will be able to: (1) delay the administrative processing of selected claims; (2) coerce claimants to enter into unfair settlements; and (3) use the administrative process to limit the scope of judicial relief.

FSLIC's newest claims procedure[27] shows this potential for abuse. Under these procedures, FSLIC through its Special Representative has 180 days after receipt of the claim (or after the end of the 90-day notice period, whichever is later) to either allow the claim in full, or retain it for further review.[28] If a claim is not allowed in full, it is automatically retained for further review, and there is no time limit set for

[27] 53 Fed. Reg. 13105 (April 21, 1988). Further revisions have recently been proposed. *See* 53 Fed. Reg. 21474 (June 8, 1988).

[28] *Id.* at 13108.

its disposition.[29] These procedures give FSLIC virtually unlimited discretion to bury large claims like Coit's in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC's purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not.[30]

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[29] Coit's claim was sent to FSLIC on September 28, 1987. (B. Pet. A-1.) On March 18, 1988, approximately six months later, Coit's claim was retained for further review. (B. Pet. A-12, 13.) As of August 1, 1988, the date of filing this brief, no action of any kind has been taken on Coit's claim and FSLIC is under no obligation to act on the claim by any certain date. Thus, approximately 10 months has passed since the claim was originally filed, and the initial determination by FSLIC has not yet occurred. Moreover, since FSLIC is under no compulsion to act once a claim has been retained for further review, and since the Board under its regulations can take 6 months to dispose of any appeal (53 Fed. Reg. at 13111), Coit's claim has for all intents and purposes been assigned to a "black hole" from which it may never emerge.

[30] FSLIC contends that the nightmare experience of Mr. Hudspeth (and now Coit itself) is not typical of the administrative process, and, in an effort to make the process appear efficient, refers to statistics outside the record in this case regarding the disposition of creditor claims in the FirstSouth and Liberty Federal receiverships. (B.R. 14 and 36, n.27.) However, as the attached correspondence with the Solicitor General's office indicates, the data on FirstSouth is incomplete and the Liberty Federal statistics are not representative. (See Appendix to this Brief at A-1 through A-3 and A-10 through A-12, hereinafter "A...") Coit was refused access to statistics on other FSLIC receiverships that Coit believes would have shown that the administrative process is a place to bury claims, not to process them.

Even the limited data on FirstSouth and Liberty Federal that Coit was furnished however, is highly revealing. Of the 103 claims filed in the Liberty Federal receivership, 20 have been allowed, 9 have been allowed in part, 17 have been disallowed and 24 have been retained for further review. However, while the average dollar amount of each of the 20 claims that were granted was only $2,134 and the average dollar amount of each of the claims granted in part was $504, the average dollar amount of each claim that was disallowed was $833,310, and the average dollar amount of each claim retained for further review was $2,076,431 (A-6). Accordingly, it is absolutely clear that FSLIC is only allowing the small

The power to bury claims also gives FSLIC the power to coerce unfair and unwanted settlements. Delay is particularly prejudicial in the context of a receivership. If a claimant knows that FSLIC can retain his claims indefinitely, and that FSLIC may in the meantime deplete the receivership estate by making interim distributions to other claimants, he is likely to place little value on his right to ultimate determination of the validity of his claim in court, which may result in a worthless judgment. Under these circumstances the exhaustion requirement can be used to force settlements that would not be attainable if a claimant's access to the courts was unimpaired.

Finally, the exhaustion requirement gives FSLIC the opportunity to turn the claims procedure into an obstacle course designed to limit the scope of judicial relief.[31]

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claims (probably of trade creditors) and is systematically disallowing or burying the large ones.

The Solicitor General suggests that the claimants in *Morrison- Knudsen Co. v. CHG International, Inc.* achieved quick settlements in the administrative forum (B.R. 36, n.27), but there is nothing in this Court's record to support that. In fact, it is not even apparent whether the settlement of the claims occurred through the administrative track or through the parallel bankruptcy proceeding for CHG International. Nor is there any indication in this Court's docket how long such claims were pending in the administrative forum. They may have been left undecided for as long as two years. All this Court's records show is that an order was signed in the bankruptcy proceeding dismissing Gibralter's claims against FSLIC on March 7, 1988 (A-13 through A-16), the same day this Court granted Coit's petition for writ of certiorari. (J.A.50).

[31] *See* 53 Fed. Reg. 13111 (Failure to request Board review of the receiver's determination within 60 days, or to contest any part thereof, results in waiver of right to judicial review). *See also* 53 Fed. Reg. 13109 (Failure to request reconsideration of receiver's proposed findings of fact and conclusions of law may be deemed waiver of objection to receiver's findings); *Id.* (Claim may be disallowed as sanction for failure to provide receiver with requested discovery, legal memoranda, or sworn statements).

Because the interests of the Board and FSLIC are adverse to those of claimants, and because there is considerable potential for abuse of an exhaustion requirement in the context of a FSLIC receivership, a Congressional intention to impose such a requirement should not be implied absent more explicit evidence of legislative intent. Where the administrative agency has such a fundamental conflict of interest, Congress and not the Board should determine whether to require exhaustion, and if so, what the parameters of such a requirement should be.

B. A Mandatory Exhaustion Requirement Will Create Significant Inequities And Inefficiencies In The Resolution of Claims.

1. ***Claims/Counterclaims***

One of the strongest arguments against finding Congressional intent to require exhaustion of administrative remedies in the context of a FSLIC receivership concerns FSLIC's need to affirmatively pursue litigation of its own as part of the collection process, including litigation against the very persons who will also be claimants against the receivership estate. An orderly liquidation requires that these claims and counterclaims be resolved in the same proceeding. However, if persons having claims against the receivership estate are required to exhaust their administrative remedies while the receiver's claims against the claimant must be heard in court, the exhaustion requirement will cause claims and counterclaims arising out of the same transaction to be heard in different forums. Rather than facilitating an orderly liquidation, such a bifurcation of unitary claims in different forums is wasteful and inefficient.[32]

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[32] For example, if FSLIC sued Coit on its note, Coit would interpose its claims against FSLIC as a defense and offset, including its claim that the usurious interest renders the note and deed of trust unenforceable. If Coit were already litigating its claim in court *defensively*, there would be a wasteful duplication of time, effort and expense in requiring Coit to complete the claims process when asserting those same claims *offensively*.

Coit submits that FSLIC's scenario of a "litigation free" claims process is a fiction. The claims process cannot be isolated from the collection process. Because FSLIC must resort to the courts to collect the debts of the association, extensive litigation is unavoidable in liquidations. Indeed, the Solicitor General has admitted as much in his Petition filed with this Court in *FSLIC v. Ticktin*, No. 85-294, where he states: "There is a large volume of litigation commenced by the FSLIC as a result of recent failures of state-chartered FSLIC insured institutions . . . ." (Pet. at 9.)

The volume of litigation commenced by FSLIC for federally-chartered institutions is even larger. Accordingly, the real choice is not between litigation or administrative action; it is between litigation in a single forum or litigation and administrative proceedings in multiple forums. It is precisely because of the interconnected nature of claims and counterclaims inherent in the liquidation process that Congress has not provided for mandatory exhaustion of administrative remedies in connection with the liquidation of financial institutions.

2. ***Foreclosures***

Perhaps the most extreme application of the *Hudspeth* doctrine has occurred in connection with extra-judicial foreclosures. In such situations, FSLIC is the aggressor, and seeks through foreclosure to bring into the receivership estate property which is owned by third parties. In states such as Texas, FSLIC can foreclose on real property without judicial proceedings, and it is the owner of the property who must secure judicial assistance if he believes the foreclosure is wrongful.

FSLIC has gone so far as to assert that the courts under *Hudspeth* may not inquire into the propriety of such foreclosures, *see FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (N.D. Tex. 1986), and the Board has attempted in its new regulations to further insulate the receiver from judicial review by forcing property owners to petition the Board for expedited relief from such foreclosures before seeking protection from the courts.[33]

Coit finds no indication of any Congressional intent to require exhaustion of administrative remedies by persons who are defending their property against claims by the receiver.[34] Thus, exhaustion should have no application to that portion of Coit's claim which merely sought a declaratory judgment of the invalidity of the note and deed of trust,

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[33] *See* 53 Fed. Reg. 13111 ("A timely request filed with the Bank Board in accordance with these procedures is mandatory to obtain judicial review of the receiver's Determination."); *Id.* at 13112 ("Requests for Expedited Relief must be filed within 5 work days from the date of . . . threatened action . . .. A notice of foreclosure is 'threatened action' by the FSLIC as receiver.").

[34] *See* B. Pet. 18, n.16. FSLIC has even less of an interest in being free from judicial intervention where it is not administering assets owned by the insolvent institution, but attempting to enlarge the receivership estate by drawing into it property owned by others. (We note that the Solicitor General has not addressed the rationale for requiring exhaustion in these circumstances.) However, FSLIC has gone so far as to invoke *Hudspeth* to insulate itself from claims that it converted the property of another even when the receiver has no claim to that property. *See* Brief of Appellant, *Zohdi v. FSLIC*, No. 88-3119, U.S. Court of Appeals, Fifth Circuit, at 4-10 (FSLIC repudiated its agreement to pay rent for appliances and then refused to return the appliances to the owner. The owner was refused judicial relief under the *Hudspeth* doctrine, and then was denied relief by FSLIC in the administrative proceeding because the bar date had passed, even though the bar date had run before the lease agreement was repudiated.) Under these circumstances, *Hudspeth* becomes more of a sword than a shield and permits the receiver to take the property of others with impunity.

or to FSLIC's threatened foreclosure of Coit's property.[35] In these circumstances, there is no statutory authorization in HOLA or the NHA for the Board to prohibit a person threatened with foreclosure by FSLIC from seeking immediate judicial relief, nor can such an application of an exhaustion requirement be justified by FSLIC's alleged need for a centralized claims procedure.

Application of an exhaustion requirement in circumstances where FSLIC seeks to foreclose against a claimant's property also threatens a property owner's due process rights to a prior or immediately subsequent judicial hearing. *See Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).[36] Surely such an intention should not be attributed to Congress absent the most explicit statutory language, especially when it cannot be shown that the Board

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[35] If FSLIC had sought judicial foreclosure on Coit's property, or had filed suit against Coit for a deficiency judgment on the note, these same claims could have been raised as defenses thereto without exhaustion. Whether or not exhaustion is required should not depend upon who is first to file suit.

[36] FSLIC contends that the Board has provided avenues for expedited relief in the event that submission to the administrative claims process results in extraordinary hardship. B.R. 35, n.26. However, administrative relief before a self-interested administrative tribunal is not considered adequate relief even if a subsequent judicial proceeding with *de novo* review is available. *Ward v. Monroeville*, 409 U.S. 57, 61-2 (1972); *Gibson v. Berryhill*, 411 U.S. at 577. Such a procedure is also inadequate because the proceeding before the Board provides no right to present evidence. Finally, the Board's procedure for expedited relief provides a claimant significantly less protection than judicial review because it must be invoked within "five work days from the date of the notice . . . or threatened action." 53 Fed. Reg. 13112 (1988). This tiny window for administrative relief is nothing but a trap for the unwary, not an adequate substitute for immediate access to the courts. *See also* T. Pfeiler, 53 Legal Bulletin at 447, n.55.

has any particular expertise in the area of foreclosures not possessed by the courts.[37]

C. A Mandatory Exhaustion Requirement Will Be Disruptive of State Court Proceedings and Raises Serious Issues of Federalism and Comity.

Although 12 U.S.C. § 1730(k)(1) permits FSLIC to remove creditor actions involving federally-chartered institutions from state to federal court, it does not permit FSLIC to remove creditor actions involving state-chartered institutions to federal court. Furthermore, even in those cases in which FSLIC has a right of removal, it must file its petition for removal within 30 days of the order appointing it as receiver, or its petition for removal is untimely. *See* 28 U.S.C. § 1446(b). As a result of these limitations upon FSLIC's right of removal, a not insignificant number of suits brought by creditors remain in state court.[38]

If a mandatory claims process were imposed on claimants, the disruption of judicial proceedings would not be confined to the federal system, but would also affect proceedings in

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[37] FSLIC asserts that it has "special expertise" in areas including loan participation agreements, real estate transactions, and the issuance of securities. B.R. 34, n.23. This is nonsense. While FSLIC regulates entities which may engage in these transactions, it has no special expertise not possessed by the courts on the substantive law of real estate, lending, and securities transactions. Moreover, even if FSLIC has expertise in these areas, such expertise cannot possibly justify the present reach of the *Hudspeth* doctrine, which has been extended to cover such areas as antitrust, RICO, civil rights, usury and common law fraud as to which FSLIC has no expertise. *See* B. Pet. 40, n.33; *see also* T. Pfeiler, 53 Legal Bulletin 433 at (App. B)

[38] *See*, e.g., *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. App. — Dallas 1986), *writ denied per curiam, FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (March 30, 1988); *Summertree Venture, III v. FSLIC*, 742 S.W.2d 446 (Tex. App. — Houston [14th Dist.] 1987, writ denied).

state courts. Congress clearly contemplated a role for the state courts in suits by creditors against insolvent state-chartered institutions, *see* 12 U.S.C. § 1730(k)(1), and there is no indication that Congress intended state courts to defer to a federal administrative proceeding. While Congress undoubtedly has the power to compel such deference by state courts, concerns of comity and federalism dictate that Congress' intention to invade an area traditionally left to the states should be unmistakable. As this Court stated in *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S. Ct. 2101, 2122 (1986):

> [W]henever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

In this case, not only will an exhaustion requirement which encompasses state law claims against state-chartered institutions affect an area traditionally left to state courts, it will also affect judicial proceedings expressly left to state courts. Yet there is nothing in the statutes which would indicate Congress' intent that state courts should defer to proceedings before FSLIC. Because "[t]here is no intimation that Congress intended to treat differently federally-chartered and state-chartered associations,"[39] and because FSLIC has admitted that it has no express statutory authority to require exhaustion, the only reasonable conclusion is that Congress never intended to impose an exhaustion requirement in suits involving creditor claims.[40]

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[39] *Morrison-Knudsen Co. v. CHG Int'l. Inc.*, 811 F2d 1209, 1221 (9th Cir. 1987), cert. pending sub nom. *FSLIC v. Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987).

[40] A mandatory exhaustion requirement will also have the effect of turning the receiver's use of a bar date for filing claims into a means for

IV EVEN IF EXHAUSTION IS OTHERWISE REQUIRED, IT SHOULD NOT BE REQUIRED IN THIS CASE.

Even if this Court determines that an exhaustion requirement should be applied to creditor claims in general, exhaustion should not be required in this case.

First, there was no administrative remedy to exhaust at the time this case was initially filed in court on October 24, 1986 (J.A.24). At that time, FirstSouth was not in receivership; FSLIC's claim process therefore had no application to creditors of FirstSouth. Accordingly, any exhaustion requirement did not come into being until December 4, 1986, when the Board appointed FSLIC as receiver of FirstSouth (J.A.7).[41] Because Coit had no notice of any applicable administrative procedure at the time it filed suit, exhaustion should not be required. *Cf., Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 865 (5th Cir. 1975).

Secondly, exhaustion should not be required for Coit's claims because exhaustion would be futile. FSLIC has already indicated that it believes Coit's claims are barred by the *D'Oenche, Duhme* doctrine. (*See* Appellee's Brief in the Fifth Circuit at 37-38.) Furthermore, the size of Coit's claims, which exceed $100 million dollars, together with the fact that FSLIC is a competing creditor to FirstSouth's limited assets, make it highly unlikely that Coit's claims will be granted by the agency. Under such circumstances, exhaustion should not be required. *See Glover v. St. Louis & S.F. Ry.*,

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modifying state and federal statutes of limitations. *See* T. Pfeiler, 53 Legal Bulletin at 462, n.104. Yet, Congress has nowhere granted the Board the power to modify substantive law. This problem is avoided under the National Bank Act because the claims process is voluntary. *See Queenan v. Mays*, 90 F2d 525, 530-31 (10th Cir. 1937).

[41] Even then, however, no *published* exhaustion requirement existed. *See* T. Pfeiler, 53 Legal Bulletin at 461 and n.102.

393 U.S. 324, 330 (1969); *Western Int'l Hotels v. Tahoe Reg. Plan. Ag'cy*, 387 F. Supp. 429, 433 (D. Nev. 1975).

Finally, Coit's claims have already been pending before FSLIC for 10 months. Under the circumstances, exhaustion should be deemed to have occurred because FSLIC has had more than enough time to decide whether or not to pay Coit's claims. *See Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). Any further delay will cause irreparable injury because the receivership estate is a wasting asset and delay may impair even the value of a favorable judgment.

CONCLUSION

For all the reasons stated, exhaustion of administrative remedies should not be required in this case. If the Board needs a mandatory claims process, it should secure appropriate legislation from Congress. Alternatively, even if exhaustion is required the Court should still reject the Board's rules and regulations because they were drafted under the erroneous assumption that FSLIC had adjudicatory power, and exceed the limited rationale for exhaustion advanced in this Court. Accordingly, if an exhaustion requirement is imposed, it should be fashioned by the Court, be of limited duration, and be in all respects commensurate with the limited objective of allowing FSLIC to decide whether or not to pay a claim.

Respectfully submitted,

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June 28, 1988

VIA FEDERAL EXPRESS
Mr. Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: *Coit Independence Joint Venture v. FSLIC*
U.S. Supreme Court
No. 87-996

Dear Mr. Fried:

In the Brief for the Respondent recently filed in the above-captioned case, a number of statements were made concerning the disposition of claims by FSLIC in the FirstSouth receivership and in the Liberty Federal S&L receivership. *See* Brief of Respondent at 14 and 36, n.27. However, no source material or other documentation was referenced in support of this statistical information, nor is it part of the record in this case.

Specifically, I am referring to the following statements in your Brief:

1. *Reference to FirstSouth receivership:*

"As of April 20, 1988, 1,773 creditor claims had been filed against the FirstSouth receivership. Approximately 400 of these claims were filed by shareholders who, in light of FirstSouth's insolvency, cannot reasonably expect to receive any proceeds of the final distribution. Of the remaining non-shareholder claims, 129 have been allowed fully, 21 have been allowed in part and disallowed in part, and 285 have been disallowed. Approximately 500 other claims have been referred to the receiver's counsel for legal advice. Thus far, only five requests have been filed seeking Bank Board review of the Special Representative's determination."

Brief for the Respondent at 14.

2. *Reference to Liberty Federal S&L receivership:*

"Hudspeth's situation is hardly typical of the administrative process. For example, of the 103 claims filed against the Liberty Federal S&L receivership, which had a claims deadline of December 10, 1987, 63 have already been resolved."

Brief for the Respondent at 36, n.27.

I am in the process of preparing a reply brief for Petitioner in the above-captioned case and cannot respond to these statistics unless furnished with the source material from which your information was derived. I am particularly interested in knowing such details as the dollar amount of the claims that were allowed as compared to the dollar amount of the claims that were disallowed or not acted upon. I would also like any information you have about the type of claims that were allowed, disallowed or remain unresolved. I would also like an aging schedule for all claims filed in the First-South and Liberty Federal receiverships that shows how long each claim has been pending before FSLIC, including the

claims on which FSLIC has not yet acted (*e.g.*, how many claims are more than 180 days old, 360 days old, etc.). In short, I believe statistics can be seriously misleading if all of the information concerning the character, amount and age of these claims is not made known to the court.

I therefore formally request that all data in your possession or in the possession of the Bank Board or FSLIC regarding the disposition of the claims that you make reference to in your Brief be furnished to me as expeditiously as possible so that I may analyze such data and make whatever reply seems appropriate.

Very truly yours,

/s/ ROBERT GOODFRIEND
Robert E. Goodfriend, P.C.

REG:tdf
cc: Jeffrey P. Minear

(Seal)

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

FEDERAL EXPRESS

July 12, 1988

Robert E. Goodfriend, P.C.
Akin, Gump, Strauss, Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618

Re: *Coit Independence Joint Venture* v. *FSLIC*
No. 87-996

Dear Mr. Goodfriend:

On June 28, 1988, you requested source information on the statistics cited in the government's brief concerning FSLIC disposition of claims in certain receiverships. In response, I have enclosed relevant pages of the most recent copies of FSLIC's claims data summaries. These summaries have been updated since the filing of the government's brief; hence, you will note some minor differences in the figures (*e.g.*, there have been 1781 claims filed against FirstSouth as of April 30, 1988, as compared to our citation of 1773 claims as of April 20, 1988). I hope this information is responsive to your request.

Sincerely,

/s/ JEFFREY P. MINEAR
Jeffrey P. Minear
Assistant to the
Solicitor General

Enclosures

SOUTHERN REGION

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM
MONTHLY SUMMARY REPORT
CLAIMS BY RECEIVER BY STATUS
MONTH ENDING APRIL 30, 1988

KEY:

ALL - ALLOWED IN FULL
DIS - DISALLOWED IN FULL
OUT - WITHDRAWN/SETTLED
PND - PENDING REVIEW
PRT - PARTIAL ALLOWANCE
RET - RETAINED FOR REVIEW

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM

MONTHLY SUMMARY REPORT — RECEIVERSHIP BY STATUS

ALL RECEIVERSHIP CLAIMS THROUGH APRIL 30, 1988

	Claimed Amount	Amount Allowed	Amount Disallowed	Claims Pending	Total Claims	Total Days
**RECEIVERSHIP: LIBERTY						
* STATUS: ALL						
* Subsubtotal * ..	42682.25	42682.25	0.00	0.00	20	721
* STATUS: DIS						
* Subsubtotal * ..	14166264.29	0.00	14166264.29	0.00	17	1577
* STATUS: OUT						
* Subsubtotal* ...	400540.00	0.00	0.00	400540.00	17	
* STATUS: PND						
* Subsubtotal * ..	1607755.69	0.00	0.00	1607755.69	16	
* STATUS: PRT						
* Subsubtotal * ..	4531.54	3760.79	770.75	0.00	9	588
* STATUS: RET						
* Subsubtotal * ..	49834345.21	0.00	0.00	*9834345.21	24	
Subtotal	66056118.98	46443.04	14167035.04	51842640.90	103	

LIBERTY FEDERAL SAVINGS & LOAN
Leesville, Louisiana

Date of Takeover: April 24, 1987

Bar Date: December 10, 1987

Total claims filed as of April 30, 1988: 103

Allowed	29
Disallowed	17
Withdrawn/Settled	17
Pending	40

Average number of days to resolve claim: 46.7 days*

* Does not include pending claims.

CENTRAL REGION

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM
MONTHLY SUMMARY REPORT
CLAIMS BY RECEIVER BY STATUS
MONTH ENDING APRIL 30, 1988

KEY:

ALL - ALLOWED IN FULL
DIS - DISALLOWED IN FULL
OUT - WITHDRAWN/SETTLED
PND - PENDING REVIEW
PRT - PARTIAL ALLOWANCE
RET - RETAINED FOR REVIEW

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM

MONTHLY SUMMARY REPORT — RECEIVERSHIP BY STATUS

ALL RECEIVERSHIP CLAIMS THROUGH APRIL 30, 1988

	Claimed Amount	Amount Allowed	Amount Disallowed	Claims Pending	Total Claims	Total Days
**RECEIVERSHIP: FIRSTSOUTH						
* STATUS: ALL						
* Subsubtotal *	244349.15	244349.15	0.00	0.00	130	26197
*						
STATUS: DIS						
* Subsubtotal *	5600578.93	0.00	5600578.93	0.00	292	5500
* STATUS: OUT						
* Subsubtotal *	24447624.24	0.00	0.00	24447624.24	433	
* STATUS: PND						
* Subsubtotal *	75588.10	0.00	0.00	75588.10	3	
* STATUS: PRT						
* Subsubtotal *	878726.94	820496.31	58230.63	0.00	21	262
* STATUS: RET						
* Subsubtotal *	670944262.13	0.00	0.00	670944262.13	902	
Subtotal....	702191129.49	1064845.46	5658809.56	695467474.47	1781	

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July 14, 1988

VIA FEDERAL EXPRESS

Hon. Charles Fried
Solicitor General
Attention: Jeffrey P. Minear
U.S. Department of Justice
Washington, D.C. 20530

Re: *Coit Independence Joint Venture v. FSLIC*
U.S. Supreme Court
No. 87-996

Dear Mr. Minear:

I am in receipt of your letter of July 12, 1988, furnishing me with information on the statistics cited in the Government's brief. I believe that one page of the information that you furnished to me from FSLIC's claim data summaries may have been inadvertently omitted. In connection with the Liberty receivership, you have furnished me two pages: (1) a status sheet on the claims filed, and (2) a page analyzing the average number of days to resolve a claim. However, with respect to the FirstSouth receivership, I have only received

the status sheet and have not received the sheet dealing with the average number of days for resolution of a claim. I would appreciate receiving the second page on the FirstSouth receivership so that I will have the same information with respect to both receiverships. Also, I would like to know if the average number of days to resolve a claim begins with the date a claim is received by FSLIC or if it runs from the bar date?

The information you sent me does not contain any analysis regarding the type of claims that have been submitted in the Liberty and FirstSouth receiverships, e.g., claims for breach of contract, tort, antitrust, usury, etc. Is there any information of this character?

I would like to know if you can furnish me with claims data summaries with respect to any other savings and loan associations, particularly those that became insolvent in late 1985 or early 1986. I notice that the Liberty Federal example which you have used had a bar date of December 10, 1987, and involves only 103 claimants. Please advise whether you can furnish me with statistics on savings and loan associations with earlier bar dates and with a larger universe of claimants.

I would also appreciate an explanation of how the category "total days" is calculated. For example, under FirstSouth the 130 claims allowed in full has the figure 26,197 under the category total days. Is this figure arrived at by adding together the total number of days for each of the 130 claims in this category from the date each claim was received, or the bar date, until the claim was allowed?

I would like to request clarification of several of the categories utilized in these reports. Please advise concerning the difference between "PND" (pending review) and "RET" (retained for review). I am assuming that retained for review is the result of action by FSLIC when they retain a claim for

further study. Does pending review have reference to claims that are pending before the Board? Please advise if my understanding of these categories is correct or if they have some other meaning that I have missed.

Finally, do you have any information on how long the claims retained for review have been pending? I notice that the figures for average number of days to resolve claims "does not include pending claims." It is this category of pending claims about which I am inquiring. Furthermore, I notice that the aging sheet contains only an average number of days for the resolution of claims that have been acted upon. Do you have any statistics reflecting the time required to act upon the last claim disposed of in each category (allowed, disallowed, withdrawn/settled)?

Thank you for sending me the claims data summaries. I would greatly appreciate your reply to these inquiries as soon as possible.

Very truly yours,

/s/ ROBERT E. GOODFRIEND
Robert E. Goodfriend, P.C.

REG:tdf

CARY & BARON
2205 Pacific Building
720 Third Avenue
Seattle, Washington 98104

March 10, 1988

Mr. Joseph F. Spaniol, Jr.
Clerk Supreme Court
of the United States
Office of the Clerk
One 1st NE
First N.E.
Washington, D.C. 20543

RE: *Federal Savings & Loan Insurance Corporation v. Stevenson Associates, et al*
No. 87-451

Dear Mr. Spaniol:

Enclosed please find a copy of an order signed on March 7, 1988 by the Honorable William L. Dwyer, Judge, United States District Court for the Western District of Washington at Seattle dismissing Gibraltar Savings & Loan Association's ("gibraltar") claims against the Federal Savings & Loan Insurance Corporation ("FSLIC") as receiver for Westside Federal Savings & Loan Insurance Corporation ("Westside") in *Rembold v. Gibraltar Savings & Loan Association*, No. C84-1644V (W.D. Wash.). As you know, in *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987), Gibraltar successfully appealed the district court's decision in *Rembold* (reported at 624 F.Supp. 1006) dismissing Gibraltar's claims against FSLIC. That case is now on appeal by FSLIC to this court under the caption *FSLIC v. Stevens & Associates, et al*, No. 87-451. This is to advise you that

Gibraltar has settled its claims against FSLIC as receiver for Westside and, per the enclosed order of dismissal, Gibraltar's claims against FSLIC are no longer at issue.

If you have any questions, please contact me.

Sincerely,

CARY & BARON,

/s/ SCOTT G. WARNER

Scott G. Warner

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WAYNE C. REMBOLD *Plaintiff,* v. GIBRALTAR SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; and QUEEN CITY INC., a Washington corporation *Defendants, Counter-claimants and Cross-claimants,* v. WESTSIDE FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, *Additional Counterclaim and Cross-Claim Defendants,* v. REMBOLD CORPORATION, an Oregon corporation, *Third-Party Defendant.*	NO. C84-1644V ORDER DISMISSING CLAIMS WITHOUT PREJUDICE
GIBRALTAR SAVINGS & LOAN ASSOCIATION and QUEEN CITY, INC., *Cross-Claimants,* v. WAYNE C. REMBOLD and KAREN REMBOLD as the spouse of Wayne C. Rembold, and their marital community; DAN WILLIAMSON and JANE DOE WILLIAMSON, as his spouse, and their marital community; SCOTT FRASER and JANE DOE FRASER, as his spouse, and their marital community; FRED ING and JANE DOE ING, as his spouse, and their marital community; WILLIAM D. SMITH and JANE DOE SMITH, as his spouse, and their marital community; MT. BALDY INVESTMENTS, an Oregon general partnership; and HGW, INC., an Oregon corporation, *Additional Counterclaim and Cross-Claim Defendants.*	

THIS MATTER, having come before the court on the joint motion of Gibraltar Savings of Washington, F.A. and Queen City, Inc. (collectively "Gibraltar") and the Federal Savings and Loan Insurance Corporation as Receiver for Westside Federal Savings and Loan Association ("FSLIC as Receiver"), NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of Gibraltar against FSLIC as Receiver be and hereby are dismissed without prejudice and without cost to any party.

DATED this 7th day of March, 1988.

/s/ William L. Dwyer
Judge William L. Dwyer

Presented by:

CARY & BARON

By /s/ Scott Warner
David Lieberworth
Scott G. Warner
Attorneys for Gibraltar
Savings of Washington
F.A. and Queen City, Inc.

PERKINS COIE

By /s/ John D. Alkire
John D. Alkire
Attorneys for FSLIC as
Receiver

G/PD800385